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Wills -- Revocation -- Attempted Revocation of Unexecuted Copy

Robert C. Vaughn Jr.

possible explanation of this dictum is that the court took a decision indicating that a physician might be liable for his own negligence in causing an assistant to injure a patient, and read into it an application of the doctrine of *respondeat superior.*

It is submitted, in the light of decisions of this and other jurisdictions, that the test for determining the liability of any physician or any assistant, free from all exceptions, should be the ordinary one of whether each was negligent; or if the assistant alone is negligent, whether the agency relationship existed.

ROY W. DAVIS, JR.

Wills—Revocation—Attempted Revocation of Unexecuted Copy

The testatrix's notation of "Null and Void, S.H.K." at the top of an unexecuted carbon copy of her will was recently held by the Pennsylvania Supreme Court to be an effective revocation.[1] The court found the notation to be "other writing" within the meaning of that jurisdiction's statutory provision regarding revocation of testamentary papers.[2]

Although the intention of the testator to nullify may be evidenced by his words and actions,[3] the privilege of execution or revocation of wills is granted by the state, and as a corollary, the testator must act in complete accord with the controlling statute in order to make or nullify a will.[4] Ordinarily, the statutes provide three permissible methods of revocation of a will:[5] (1) execution of a subsequent will or codicil; (2) making of some other writing declaring the will revoked; and (3) by tearing, burning, cancelling, or obliterating the document itself.[6] Thus the distinction between a "cancellation" as a method of revocation and

not relieved from liability by the fact that he acted at the command or under the direction of his principal.").

[23] Such an exception is clearly contradicted in Ybara v. Spangard, 25 Cal. 2d 486, 492, 154 P. 2d 687, 690 (1945): "Any defendent who negligently injured him [the patient], and any defendant charged with his care who so neglected him as to allow injury to occur, would be liable. The defendant employers would be liable for the neglect of their employees; and the doctor in charge of the operation would be liable for the negligence of those who became his temporary servants for the purpose of assisting in the operation." For a statement of the law applicable to situations herein discussed, see Hohenthal v. Smith, 114 F. 2d 494 (D. C. Cir. 1940).

[1] *In re* Kehr's Estate, 373 Pa. 473, 95 A. 2d 647 (1953).

[2] PA. STAT. tit. 20, § 180.5 (1950).

[3] The testatrix in the principal case did not have the original document but after writing on the carbon, she wrote her attorney stating that she had cancelled her will.

[4] Parker v. Foreman, 252 Ala. 77, 39 So. 2d 574 (1949); *Re* Johannes' Estate, 170 Kan. 407, 227 P. 2d 148 (1951); Crampton v. Osburn, 356 Mo. 125, 201 S. W. 2d 336 (1947); Davis v. King, 89 N. C. 441 (1883); Churchill's Estate, 260 Pa. 94, 103 Atl. 533 (1918).

[5] The North Carolina statute is typical. N. C. GEN. STAT. § 31-5 (1950).

[6] Revocation by a subsequent will or codicil is not within the purview of this note. For a discussion of this, see Zacharias and Maschinot, *Revocation and Revival of Wills,* 25 CHI-KENT L. REV. 185, 201 (1947).

the use of some "other writing" for such a purpose is usually pointed up in the various state statutes by specifying the two methods of revocation in the alternative.[7]

A cancellation or obliteration of a will is the doing of a physical act to the paper itself,[8] and it is usually held that in order to be effective, some material part of the document or some of the words in the text of the will must be marked over.[9] A mere notation in the margin or on the back of the paper is generally held insufficient to constitute this type of revocation.[10]

The above discussed methods of revocation and their limitations also apply in the case of executed duplicate wills where the testator attempts to revoke by cancelling, tearing, or burning one of the two copies. The general rule throughout the United States is that when a testator tears or obliterates his copy, this works a revocation of the duplicate in the hands of someone else.[11] Furthermore, when the testator was known to be in possession of a copy of a will and such copy is found after his death in a mutilated condition, there arises a rebuttable presumption that he acted *animo revocandi,* and therefore, no other duplicate or conformed copy may be admitted to probate.[12] This same principle applies when the testator's copy cannot be found after his death and it is known that there was a duplicate in his possession.[13] However, the presumption is

[7] The statutes of forty states make this distinction. The laws of Connecticut [CONN. GEN. STAT. § 6956 (1949)]; Illinois [ILL. ANN. STAT. c. 148, § 19 (1951)]; Iowa [IOWA CODE ANN. c. 32, § 633.10 (1950)]; Missouri [MO. REV. STAT. § 20.521 (1949)]; Nevada [NEV. COMP. LAWS § 9912 (1929)]; Washington [WASH. REV. STAT. ANN. § 11.12.040 (1931)]; and Wyoming [WYO. COMP. STAT. ANN. § 6-306 (1945)] have no provision for revocation by "other writing." The Tennessee Statute [TENN. CODE ANN. § 8097 (1934)] prohibits the revocation of a written will by a nuncupative will but is silent as to other methods of revocation. For a complete compilation of state statutes pertaining to wills, see THOMPSON, WILLS (Supp. 1950).

[8] *In re* Smith's Estate, 77 F. Supp. 217 (D. C. D. C. 1948); Meredith v. Meredith, 5 Harr. (Del.) 35, 157 Atl. 202 (Super. Ct. 1931); *In re* Semler's Will, 176 Misc. 687, 28 N. Y. S. 2d 390 (Surr. Ct. 1941); *In re* Heller's Estate, 158 Pa. Super. 194, 44 A. 2d 528 (1945); Franklin v. McLean, 192 Va. 684, 66 S. E. 2d 504 (1951). See also, Note, 24 A. L. R. 2d 517 (1952).

[9] *In re* Berman's Will, 185 Misc. 1037, 58 N. Y. S. 2d 512 (Surr. Ct. 1945); *In re* Love, 186 N. C. 714, 120 S. E. 479 (1923); Thompson v. Royal, 163 Va. 492, 175 S. E. 748 (1943). *Contra:* Franklin v. Bogue, 245 Ala. 379, 17 So. 2d 405 (1944); Evan's Appeal, 58 Pa. 238 (1868).

[10] Howard v. Hunter, 115 Ga. 357, 41 S. E. 638 (1902) (on back of the page); *In re* Hinker's Estate, 158 Kan. 406, 147 Pac. 740 (1944); Sanderson v. Norcross, 242 Mass. 43, 136 N. E. 176 (1922) (margin). See also I PAGE, WILLS, § 430, p. 778 (3rd ed. 1941).

[11] *Re* Holmburg's Estate, 400 Ill. 366, 81 N. E. 2d 188 (1948); *In re* Beaney's Estate, 62 N. Y. S. 2d 341 (Surr. Ct. 1946); I PAGE, WILLS, § 437 (3rd ed. 1941); ATKINSON, WILLS, p. 376 (1937). For a collection of cases to this effect, see, Note, 48 A. L. R. 297 (1927).

[12] See note 11 *supra,* and note 13 *infra;* but this presumption is not conclusive. See, *E.g., Re* Walsh, 196 Mich. 42, 163 N. W. 70 (1917).

[13] Mangle v. Parker, 75 N. H. 139, 71 Atl. 637 (1908); *In re* Bett's Will, 200 Misc. 633, 107 N. Y. S. 2d 626 (Surr. Ct. 1951); *In re* Will of Wall, 223 N. C. 591, 27 S. E. 2d 728 (1943); Bate's Estate, 286 Pa. 583, 134 Atl. 513 (1926).

sufficiently rebutted when it can be proved that the mutilation or destruction was an accident,[14] or that the testator was under the impression that the remaining copy would still be valid after the duplicate was destroyed.[15]

In a majority of the decisions where revocation was found as a result of cancellation or other writings on duplicate wills, both copies had been executed.[16] It is to be noted that this element of *execution* is lacking in the principal case,[17] for there is obviously a material difference between a *signed duplicate original* and an *unexecuted carbon copy* of a will.[18] Furthermore, in those jurisdictions where the question of revocation has arisen as to unsigned copies, the courts have generally been hesitant to extend the law to allow an attempted cancellation of an unexecuted copy.[19]

In a leading case on this problem, In re *Wehr's Will*,[20] the testator, having left the original will in the custody of his attorney, had in his possession a conformed copy which was found in a mutilated condition after his death. The Wisconsin Court there said in answer to the respondent's contention of revocation: "There is no authority whatever to the effect that destruction or mutilation of a copy of the will, conformed or otherwise, is effective to accomplish a revocation. . . . It seems to us that to hold that a mutilation of a conformed copy was a revocation would be to interpolate or add to the statute what plainly is not there or to establish a symbolic revocation by a judicial decree in the face of a statute which plainly does not mean to recognize it."[21]

[14] *In re* Martin's Will, 180 Misc. 113, 40 N. Y. S. 2d 685 (Surr. Ct. 1943) (ink was spilled on the original at the time of execution and it was discarded with no intention of revocation.)

[15] *In re* Patterson's Estate, 55 Cal. 626, 102 Pac. 941 (1909); Mangle v. Parker, 75 N. H. 139, 71 Atl. 637 (1908); Combs v. Howard, 131 S. W. 2d 206 (Tex. Civ. App. 1939).

The courts differ as to what inference may be said to arise when the testator had possession of both copies, one of which is not found after his death, the more recent cases holding that there is no revocation and allowing the discovered duplicate to be probated. Phinizee v. Alexander, 210 Miss. 196, 49 So. 2d 250 (1950) (where one copy found in a mutilated condition, it was held that there was no revocation on the grounds that if the testator had intended to have voided his will, he would have cancelled both duplicates); *In re* Mittelslaedt's Will, 280 App. Div. 163, 112 N. Y. S. 2d 166 (1st Dept. 1952) (one of two duplicates which had been in the testator's possession found and admitted to probate, the court holding there to be no revocation.) *Contra:* ATKINSON, WILLS, p. 376 (1937); I PAGE, WILLS, § 437 (3rd ed. 1941), citing English decisions.

[16] See notes 11-15 *supra.*

[17] *In re* Kehr's Estate, 373 Pa. 473, 95 A. 2d 647 (1953).

[18] In Hull v. Cartin, 61 Idaho 578, 105 P. 2d 196 (1940), the court said: "The copy . . . falls short of being a 'duplicate original' in the vital and essential particular that it was never executed by being signed and witnessed." *See; In re* Kehr's Estate, 373 Pa. 473, 95 A. 2d 647, 651 (1953) (dissent).

[19] See notes 20, 21 *infra;* I PAGE, WILLS, § 437, p. 83 (1950 Supp.) ("Tearing, etc., an unexecuted copy of a will is not a revocation of such will.").

[20] 247 Wis. 98, 18 N. W. 2d 709 (1945).

[21] *In re* Wehr's Will, 247 Wis. 98, 110, 18 N. W. 2d 709, 715 (1945). The *Wehr* case was cited with approval in *In re* D'Agostino's Will, 9 N. J. Super. 230,

Only one case is found which seems to concur with the principal case.[22] There the court, by dictum, indicated that the revocatory writing was a valid nullification *per se,* without giving any particular significance to the fact that the writing happened to be on an unexecuted copy of the will.

The North Carolina Court has never faced the problem involved in the *Kehr* case but seems to concur with the majority rules as regards revocation of wills generally in that there must be a strict compliance with the statute,[23] that parol evidence may not be introduced to add to or interpolate a written revocation,[24] and that part of the will itself must be crossed through in order for a cancellation to be effective.[25] In the only case in which the North Carolina Court has been faced with a problem involving duplicate wills, it was held that a presumption of revocation arose when one duplicate could not be found and that the jury should decide whether or not this presumption had been sufficiently rebutted.[26]

In the principal case, the majority opinion readily concedes that the revocation there attempted could not be a cancellation, because the copy had no validity or life to be voided,[27] but found the notation on the unexecuted copy to be effective as another writing.

The interpretation placed by the courts on the statutory phrase "other writing" varies, but in the majority of the jurisdictions the "other writing" must be executed with the same formalities required for the execution of the will in the first instance.[28] The majority opinion in the principal case argues that this requirement has been met. However, it

75 A. 2d 913 (App. Div. 1950) where the testator tore his unexecuted copy and threw the pieces into the wastebasket. The court held there to be no revocation, regardless of the testator's intent, because the requisites of the statute were not met.

[22] *In re* Smith's Estate, 31 Cal. 2d 563, 191 P. 2d 413 (1948).

[23] Davis v. King, 89 N. C. 441 (1883).

[24] *Ibid.*

[25] *In re* Love, 186 N. C. 714, 120 S. E. 479 (1923); *In re* Shelton's Will, 143 N. C. 218, 55 S. E. 705 (1906).

[26] *In re* Will of Wall, 223 N. C. 591, 27 S. E. 2d 728 (1943). No North Carolina case with more similar or closely analogous facts to those in the principal case is to be found. However, on related issues, North Carolina is in accord with those jurisdictions holding *contra* to the principal case, and so it would appear that should the problem involved in the principal case be presented to the North Carolina Supreme Court, North Carolina would hold *contra* to the decision in the *Kehr* case.

[27] *In re* Kehr's Estate, 373 Pa. 473, 95 A. 2d 647, 650 (1953).

[28] Depending on the relevant state statute, this can mean that the testator must sign the revocation, and in some jurisdictions, it must be witnessed. See N. C. GEN. STAT. § 31-5 (1950); Dowling v. Gilliland, 286 ILL. 530, 122 N. E. 70 (1919) (attempted revocation invalid because not witnessed); *In re* Konner's Estate, 101 N. Y. S. 2d 651 (Surr. Ct. 1950) (an invalid will held as an effective revocation of a prior will); *In re* William's Estate, 336 Pa. 235, 9 A. 2d 377 (1939) (no revocation because attempted revocatory writing not signed.) See also, Note, 3 A. L. R. 833 (1919).

seems that parol evidence would be needed to explain the notation as being meant to apply to the original executed will, while the generally accepted rule, both in Pennsylvania and elsewhere, is to the effect that the "other writing" must be self-sufficient, with parol evidence being used only to explain any ambiguous words employed, not to evidence what the testator intended the writing to mean.[29]

The writer submits that the decision in the *Kehr* case is a substantial extension of the statutory right of revocation of wills, with far too much emphasis being placed on surrounding circumstances and insufficient stress being placed on the attempted revocatory act itself.

ROBERT C. VAUGHN, JR.

[29] *In re* Maloney's Estate, 27 Cal. App. 2d 332, 80 P. 2d 998 (1938); McIver v. McKinney, 184 N. C. 393, 114 S. E. 399 (1922); *In re* Myer's Estate, 351 Pa. 472, 41 A. 2d 570 (1945); Industrial Trust Co. v. Wilson, 61 R. I. 169, 200 Atl. 467 (1938); Rule v. First National Bank of Clifton Forge, 182 Va. 227, 28 S. E. 2d 709 (1944).